

Abreha (Migration) [2022] AATA 5193 (3 August 2022)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Ms Berezaf Kahsay Abreha

VISA APPLICANTS: Miss Selam Araya Weldu
Mr Eyob Araya Weldu

CASE NUMBER: 1925255

HOME AFFAIRS REFERENCE(S): 2016046959 OSF2016046959

MEMBER: Stephen Conwell

DATE: 3 August 2022

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decisions not to grant the visa applicants Child (Migrant) (Class AH) visas.

1.

Statement made on 03 August 2022 at 6:00pm

CATCHWORDS

MIGRATION – Child (Migrant) (Class AH) visa – Subclass 117 (Orphan relative) – false or misleading information – bogus document – death certificates – agency relationship – waiver of requirement – decision under review affirmed

2.

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cls 117.211, 117.223; Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 18 July 2019 to refuse to grant the visa applicants Child (Migrant) (Class AH) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
4. The visa applicants (applicants) applied for the visas on 6 June 2016. At that time, Class AH contained three subclasses: Subclass 101 (Child), Subclass 102 (Adoption) and Subclass 117 (Orphan Relative). In this case, claims have been made in respect of the Subclass 117 visa.
5. The criteria for a Subclass 117 visa are set out in Part 117 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). Relevantly to this case, they include cl.117.223.
6. The delegate refused to grant the visas because in each case the applicant did not meet cl.117.211 of Schedule 2 to the Regulations because the delegate was not satisfied the applicants did not satisfy the requirements of cl 117.223 of Schedule 2 to the Regulations because the delegate found they did not meet Public Interest Criterion (PIC) 4020.
7. The sponsor provided a copy of the delegate's decision to the Tribunal for the purpose of the review.
8. The hearing was held during the coronavirus (COVID-19) pandemic. Having regard to the nature of the review, and the objectives of the Tribunal to provide a mechanism of review that is just, fair, economical and quick, the Tribunal determined that it was appropriate that this review be conducted by way of video hearing via MS Teams. The Tribunal exercised its discretion to hold the hearing by video. The sponsor raised no objections as to conducting the hearing by video.
9. The sponsor attended the hearing by video via MS Teams on 3 August 2022 to give evidence and present arguments. The Tribunal also received oral evidence from her spouse, Mr Muruts Gebreslasse who participated by telephone. The Tribunal hearing was conducted with the assistance of an interpreter in the Tigrinya and English languages. The interpreter also attended the Tribunal hearing by video.
10. For the following reasons, the Tribunal has concluded that the decisions under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

11. The law

12. The issue for determination in this case is whether the visa applicants satisfy PIC 4020 as required by cl.117.223 and if not, whether there are compassionate or compelling circumstances to justify waiver of PIC 4020.
13. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or

refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and

- the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

14. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act. In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
15. Under s. 5(1) of the Act, a bogus document is one that the Minister reasonably suspects:
 - (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.
16. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
17. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
18. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

19. **The delegate's decision**

20. In the Form 40CH *Sponsorship for a Child to Migrate to Australia* the sponsor stated that the applicant, Selam Araya Weldu is her niece and that the applicant, Eyob Araya Weldu is her nephew. She claimed that she and the applicants' mother, Mrs Hiwet Kahsay Abrha, were siblings. The applications were made on the basis that the applicants' parents, Mr Araya Weldu Kassa and Mrs Hiwet Kahsay Abrha, are deceased.
21. In support of the applications the sponsor submitted to the Department death certificates for the parents issued by the Ethiopian Orthodox Tewahido Church, St Michael Church.
22. The death certificate for the applicants' father, Mr Araya Weldu Kassa, indicates that the date of death was "30/11/2006" and the date of registration was "21/08/2019". The certificate was issued on the registration date.

23. The death certificate for the applicants' mother, Mrs Hiwet Kahsay Abrha, indicates that the date of death was "20/051/2007" and the date of registration was "21/08/2019". The certificate was issued on the registration date.
24. The Department conducted a verification check on the death certificates through the assistance of the International Organisation for Migration (IOM) Ethiopia. The Department's Visa Integrity Unit advised the Department by email of 20 March 2019, that a representative of IOM Ethiopia had attended the issuing office of the death certificates between 14 – 16 March 2019 in order to verify the authenticity of the documents. During this site visit, the IOM representative was advised that the death certificates had not been issued by the issuing office. Furthermore, the 'wet seals' appearing on the documents were not consistent with genuine seals used by the issuing office.
25. On 21 March 2019, the Department wrote to the applicants and invited them to comment on the evidence suggesting that they had provided bogus documents as part of their visa applications, specifically relating to the death certificates of their claimed biological parents. They were advised that the Department had conducted 'integrity checks' on the death certificates by attending the issuing office, which had produced the following information:
- the documents were not issued from the office
 - the wet seals appearing on the document were not consistent with genuine seals used by the issuing office
26. Consequently the Department had formed a preliminary view there is evidence suggesting that the applicants had provided bogus documents as part of their respective visa applications, specifically, that their parents' death certificates were not found to be genuine.
27. The applicants were invited to comment on the Department's preliminary view that it considered both death certificates to be non-genuine; the applicants were also asked whether there were any compelling circumstances affecting the interests of Australia, or compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, to justify the waiver of PIC 4020.
28. The sponsor responded by email on 23 March 2019, stating, in part:
- "..... L Berezafe Abreha the sponsor of my relatives Selam Araya Weldu whose file number is 2016046959, Eyob Araya Weldu whose file number is 2016046960 and Samuel Araya Weldu whose file number is 2016046961 I received a letter written on the 21 March, 2019 indicating that there was bogus or untruth content off the death certificate that was provided. I once again inform you that all the contents in the documents provided were true and correct. I send you again scanned copy of the documents as attached files of both parents death certificates that were issued from the church that their funeral celebrations were performed.
29. The sponsor attached to her response the same death certificates that the Department had found to be non-genuine. The sponsor made no submissions addressing any compassionate or compelling reasons to justify waiver of PIC 4020.
30. After considering the sponsor's response and other evidence, the delegate found that the death certificates were bogus documents provided by the applicants in support of their application. The delegate decided there were no compelling circumstances that affect the interests of Australia or any compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen that would justify the grant of this visa.
31. **Information provided to the Tribunal**
32. Prior to the hearing the sponsor provided:

- death certificates for the parents issued by the Ethiopian government (Tigray Region), with accompanying English translations;
- a written statement dated 24 July 2022 from Mr Ghebremedhin Atsebaha who was intending to appear as a witness but was no longer able to do so because of overseas travel;
- Evidence of money transfers between 2018 to 2022 from the sponsor to either Gebrekiros Gebremedhin or Tsige Kahsay as financial support for the applicants

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

33. The Tribunal explained at the hearing that the issue is whether the applicants satisfy PIC 4020 as required by cl.117.223 and if not, whether there are compassionate or compelling circumstances to justify waiver of PIC 4020.
34. The sponsor told the Tribunal that she had initially misunderstood the Department's concerns regarding the death certificates and because of her misunderstanding had re-sent the same documents to the Department. By the time she had obtained 'official' death certificates from the appropriate Ethiopian government office, the Department decision to refuse the applications had been finalised.
35. The Tribunal finds the sponsor's explanation at hearing to be unconvincing. In her reply of 23 March 2019 to the 'natural justice' letter, the sponsor clearly indicates that she understood the reason for the Department's questioning of the documents – that it had preliminary concerns that the death certificates were non-genuine.
36. The sponsor told the Tribunal that while she believed the death certificates issued by the Church to be genuine, she claimed to have 'confirmed' their validity by applying for, and receiving, death certificates from the appropriate Ethiopian government office, which she would have submitted to the Department, had it not already decided to refuse the visa applications.
37. The Tribunal notes that the witness statement from Mr Gebremedhin Atsebaha (set out in its entirety below) does not comment upon the issue whether the death certificates submitted to the Department were bogus documents:
 - I. Ghebremedhin Atsebaha will be one of the witnesses of case number 1925255.
 - On the hearing day, I will not be attending the hearing because on August 1, 2022, I will travel overseas.
 - I write my witness statement as follows. I have known Ms Brzaf Abraha the sponsor of her orphan relatives since the time that she lodged the application. I supported her to fill the form and lodged. I cooperated with her during the correspondence with the Department of Home Affairs.
 - Finally Ms Brzaf was asked to provide documents in a time limit. Before she provided the documents that she was asked to provide, the department sent her a letter of refusal.
 - I know that Ms Brzaf supported the orphan children by sending money from Australia and was contacting the orphan children to support the morally and psychologically.
38. The Tribunal accepts the sponsor's evidence that she was not aware that the death certificate counterfeit, however, as noted, PIC 4020 applies whether or not the document or information was provided by the applicant knowingly or unwittingly. It is not necessary for the Tribunal to determine that the applicants or sponsor were involved in obtaining the bogus documents or that they provided that documents knowingly.

39. To meet the definition of bogus document, there need only be a reasonable suspicion of a document being bogus, not probative evidence. The Department's verification process assessed the death certificate provided as counterfeit. The Tribunal has considered the sponsor's response to the natural justice letter and her oral testimony at hearing, however it accords significant weight to the outcome of the Department's verification process. Accordingly, the Tribunal reasonably suspects that the death certificates are counterfeit and finds that each document is a bogus document within the definition of s.5(1)(b) of the Act.
40. The Tribunal notes the death certificates found by the Department to be bogus documents were submitted by the sponsor. The Tribunal is satisfied that an agency relationship exists between the applicants (who were all minors at the date of visa application) and the sponsor, who is their aunt. The Tribunal finds that by virtue of the agency relationship the applicants did cause the bogus documents to be submitted as part of their visa applications. The applicants submitted the documents when applying for Orphan Relative visas and the Tribunal finds that there is evidence that the applicants have given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document.
41. For this reason, the Tribunal is not satisfied that the two applicants meet the requirements of PIC 4020(1).

42. Should the requirements of PIC 4020(1) or (2) be waived?

43. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
44. The sponsor made no submissions that there were compelling reasons affecting the interests of Australia. The Tribunal has considered the evidence and is not satisfied that there are compelling circumstances that affect the interests of Australia to justify the grant of the visa in the present case.
45. The Tribunal turns to consider the remaining circumstances for waiver. The sponsor is an Australian citizen. Accordingly, the question that arises is whether there are compassionate or compelling circumstances that affect her interests if the requirement to meet PIC 4020(1) is not waived.
46. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
47. The Tribunal is required to consider all the circumstances of the case including any matters put forward by an applicant and determine on the evidence whether there are compelling and/or compassionate circumstances justifying the granting of the visa.
48. The sponsor told the Tribunal that the applicants' parents had each died of natural causes and she has been providing the applicants with ongoing financial and psychological support. The Tribunal accepts this claim. The sponsor said she hoped that the applicants can come to live in Australia. The Tribunal notes that for waiver it is not the interests of the visa applicant which are taken into account but that of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen. The Tribunal does not consider there are compassionate or compelling circumstances to waive PIC 4020(1) in this instance.

49. The Tribunal acknowledges that the sponsor would like the applicants to join her in Australia, however, the Tribunal considers that the use of the words 'compelling' and 'compassionate' in the Regulations indicates a degree of gravity that is not demonstrated in the evidence in this case. The provision of a bogus document to the Department is a serious matter and on balance the Tribunal was not persuaded that there are factors in this case which affect an Australian citizen, permanent resident or eligible New Zealand citizen, either on an individual or cumulative basis, and which are of a compelling or compassionate nature that justify the waiver of PIC 4020. Accordingly, the Tribunal is not satisfied that the requirements should be waived.
50. Therefore, the requirements of PIC 4020(1) should not be waived.
51. On the basis of the above, the applicants do not satisfy PIC 4020 for the purposes of cl 117.223.
52. There is no evidence before the Tribunal, and no claims have been made, in respect of the other visa subclasses in Class AH (Subclass 101 and Subclass 102).
53. **DECISION**
54. The Tribunal affirms the decisions not to grant the visa applicants Child (Migrant) (Class AH) visas.

Stephen Conwell
Member

- **ATTACHMENT – RELEVANT LAW**

- **Migration Regulations 1994**

1.14 Orphan relative

An applicant for a visa is an orphan relative of another person who is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen if:

- (a) the applicant:
 - (i) has not turned 18; and
 - (ii) does not have a spouse or de facto partner; and
 - (iii) is a relative of that other person; and
- (b) the applicant cannot be cared for by either parent because each of them is either dead, permanently incapacitated or of unknown whereabouts; and
- (c) there is no compelling reason to believe that the grant of a visa would not be in the best interests of the applicant.